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Submission Responding to the Law Council of Australia Justice Project Consultation Paper August 2017.
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The Justice Project
GPO Box 1989
Canberra ACT 2601
Australia

By email: justiceproject@lawcouncil.asn.au

30 September 2017

Dear Sir/Madam,

Submission Responding to the Justice Project Consultation Paper August 2017

Thank you for the opportunity to provide a submission in response to the abovementioned consultation paper for the Justice Project. We would like to commend the Law Council of Australia on undertaking this project.

We provide this submission in response to the consultation paper (August 2017). We make some general comments followed by specific submissions in response to the questions posed.

About the Contributors

Dr Kelly Purser TEP is a senior lecturer in the Law School at the Queensland University of Technology and a member of the Australian Centre for Health Law Research. Dr Purser has published nationally and internationally on capacity assessment. She has recently published a book about the relationship between legal and health professionals when assessing legal capacity and the need for national assessment guidelines, including a suggested paradigm.

Dr Bridget Lewis is a senior lecturer in the Law School at the Queensland University of Technology and a member of the International Law and Global Governance Research Program. Dr Lewis has published widely on a range of human rights issues, particularly the application of international human rights law to contemporary issues.

Associate Professor Tina Cockburn TEP is an Associate Professor in Law at the Queensland University of Technology Faculty of Law, Brisbane. Tina is a member of the Queensland Law Society Health and Disability Law Committee, the Society of Trusts and Estate Practitioners (STEP) and the Australian Centre for Health Law Research. Her research focuses on the legal rights and remedies of vulnerable and incapacitated members of society, including equitable claims to property; trusts and estate planning including enduring powers of attorney; elder financial abuse; and housing and retirement villages.

Dr Fiona McDonald is a senior lecturer in the Faculty of Law at the Queensland University of Technology. She is also an Adjunct Associate Professor at the Department of Bioethics, Dalhousie University, Canada. Fiona is a member of the Australian Centre for Health Law Research. Fiona was a legal advisor to New Zealand's Health and Disability Commissioner. Her research encompasses issues related to health governance.

General comments

We agree that more work based upon rigorous research must be conducted into improving access to justice for the identified groups.

Guiding principles

We submit that the principles used to underpin the Justice Project should be based within an **overarching human rights framework**. The human rights of people are protected in a number of international instruments including the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of Persons with Disabilities* (CRPD). Consequently, Australia is obliged to ensure that certain human rights are respected, protected and fulfilled, including, in the broad sense, the right to access justice.¹ It should be noted however that, while human rights principles provide a useful and appropriate normative framework for conceptualising better ways to access justice, human rights themselves are not well-protected in Australian domestic law. The lack of domestic enforceability of human rights impacts access to justice because it restricts the vehicles through which vulnerable people can enforce their rights and thus access justice.

The question of **funding** is crucial to any serious dialogue around improving access to justice. Funding is a difficult issue to which there is no easy answer. However, ensuring that existing community legal centres, especially those in regional, rural and remote areas, are adequately funded is an ideal starting point. There also needs to be some certainty and continuity over funding. Threatened or actual funding cuts can result in increased workloads for courts, police, hospital and other community based organisations. It also results in fear and distress amongst those accessing the services, thus effectively reducing access to justice.

The ‘Australian laws, policies, practices and systems’ are identified² but what of the **role of legal actors**, that is solicitors, barristers and the judiciary, in accessing justice? Legal actors have an important role to play in making justice accessible. The ‘law’ can be imposing, intimidating and expensive to access. Consequently, legal practitioners and the judiciary have an important role to play in overcoming this and encouraging access to justice, for example, through participation in

¹ See, eg, *Convention on the Rights of Persons with Disabilities* art 12(5) and art 13; and arts 2 and 14 of the *International Covenant on Civil and Political Rights*.

² Law Council of Australia, *The Justice Project Introduction and Consultation Questions*, Consultation Paper, (2017) 6.

pro bono legal programs and by considering how they can provide access in rural or remote regions.

Submission: a human rights framework should be explored along with maximising the role of legal ‘actors’. Adequate funding of all existing community legal centres needs to be addressed.

Approach of work undertaken to date - general approach

The concept of a person’s general capability to access justice (as set out in the consultation paper) is identified as being based in ‘their knowledge, skills and readiness to act in response to legal problems.’³ It is submitted that a person’s **legal capacity** to be able to make legally recognised decisions should also be taken into account, including the differing levels of cognition necessary to be able to make specific decisions. Much work is being done in the area on the assessment of legal capacity,⁴ but acknowledging the significant role that mentally disabling conditions can have on the requisite legal capacity to make decisions at law should also be acknowledged here. This is because people with diminished capacity form one of the most vulnerable groups when attempting to access justice as they may prematurely lose legal rights if assessed inappropriately or may be vulnerable to exploitation or abuse if unable to access services that may assess legal capacity in a timely and accurate way. The critical issue is how a decision is reached and by whom that an individual has lost legal capacity. Appropriate definitions, including of the requisite legal capacity, are fundamental. In addition to this, the requisite legal standard also needs to be clearly identified to establish the level of understanding required on the part of the individual in question.

Submission: recognition must also be accorded to satisfactorily identifying and assessing the relevant legal capacity.

The suggestion of separating those experiencing ‘economic disadvantage’ from the ‘missing middle’⁵ is sensible, although it is submitted that it is vital that a future project should (not could as stated in the consultation paper) be devised which addresses the access to justice issues facing this cohort. This is especially important in the context of **elder abuse**, for example abuse of a valid enduring power of attorney, wherein it is the ‘missing middle’ who are often the most vulnerable because they have some funds thus making them attractive targets, but are still unable to access justice.

Submission: a project addressing the ‘missing middle’ is necessary, especially given growing incidents of elder abuse.

Regarding **terminology**, it is noted that terminological clarity is always elusive. Even the phrase ‘**access to justice**’ is opaque in its meaning. Does this mean the actual ability of an individual and/or group to access legal professionals and/or formal dispute resolution methods such as the courts in which case practicalities such as cost are fundamental concerns? Alternatively, does it focus on whether ‘justice’ has been achieved, that is, what is the outcome and is the outcome commensurate to the legal issue presented? This is more of a theoretical concern and one which

³ Ibid 8.

⁴ K Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer, 2017).

⁵ Law Council of Australia, above n 2, 8.

raises questions over ‘quality’ of the justice that is able to be accessed. For example, an accredited specialist lawyer who practises exclusively in the subject area may be able to secure better outcomes for clients compared with a general practitioner who has had one or two matters in the subject area previously. Traditionally, access to justice has been more narrowly defined as the ability of an individual to access formal resolution processes in the court system or access to legal representation in court. A broader definition exists, however, which encompasses the ability to exercise an individual’s legal rights. We submit that a broader definition should be used as many legal rights, such as the right to, for example, make a will and/or appoint an enduring power of attorney occur outside a court room but are no less critical to a person’s ability to access justice and the rights of citizenship. As noted by the United Nations, ‘in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.’⁶

A clear definition of what constitutes ‘**regional, rural and remote**’ is also elusive. Definitions can involve a combination of factors such as population density and distance to services – effectively consisting of subjective views of what constitutes regional, rural and remote.⁷ Consequently, a clear determination will need to be made on what is included in determining regional, rural or remote status – especially for the purpose of any empirical work undertaken to provide a stronger evidence base for proposed policies.

With respect to ‘the elderly’ it is suggested that there should be some differentiation between **older people** and those falling within a category of ‘old, old’.⁸ Much debate exists around a definite age for ‘older’ people which can range from 55 years and over to 65 years and over. The World Health Organisation and the Australian Law Reform Commission accepted the definition of older including people aged 65 years and over. The ‘old, old’ category seems to range in age from approximately 80 years and over. A distinction should be drawn between these two categories because incidents of mentally disabling conditions which affect cognition tend to increase once a person attains around the age of 80 years. It is less a matter at that age of whether cognitive decline will occur, but more a question as to what extent it will be experienced. It should be noted that for Indigenous Australians, the category of ‘older’ is generally classified as commencing at 50 years and over.

As identified in the consultation paper,⁹ people can experience vulnerabilities on multiple fronts. This is also true of older people. **Older women** are especially vulnerable given that many have taken time out of the workforce to perform family or carer duties causing a negative impact on their financial security (particularly superannuation). This is particularly problematic if there has been a marriage breakdown, and single women over the age of 50 are among the most vulnerable to homelessness in Australia.¹⁰ Neglect, abuse and violence against older women often goes

⁶ United Nations, *Access to Justice* <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (accessed 27.09.2017).

⁷ C Simpson and F McDonald, *Rethinking Rural Health Ethics* (Springer 2017); L Bourke, J Taylor, JS Humphreys and J Wakerman, ‘Rural health is subjective, everyone sees it differently: Understandings of rural health among Australian stakeholders’ (2013) 24 *Health and Place*, 65-72.

⁸ Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83, (2016) 22.

⁹ Law Council of Australia, above n 2, 9.

¹⁰ Homelessness Australia and Equality Rights Alliance, *Ending and Preventing Older Women's Experiences of Homelessness in Australia*, Joint Submission to Inquiry on Economic Security of Older Women.

undetected which serves as a significant barrier to accessing justice. Although a 2013 report, *Neglect, Abuse and Violence against Older Women*,¹¹ presents the different risk factors and forms of abuse suffered by older women there is a lack of data on older women's experiences of neglect, abuse and/or violence. Such data is crucial for the development of evidence-based approaches and for measuring the effectiveness of legislation or a more general plan to promote access to justice.

It is submitted that in considering ways to strengthen access to justice it is also important to address the fundamental issue of **ageism**. Ageism is the stereotyping of and discrimination against people because of his/her/their age. Consequently, it should be noted that age, in and of itself, is not determinative of an individual's ability to access to justice.

Submission: terminological clarity is fundamental especially with a view to undertaking empirical evidence to support the development of evidence based policies. It is necessary to define relevant terms, in particular, what is meant by 'access to justice', 'regional, rural and remote' and 'older people'. It should be noted that to adequately define 'older' with a view to accessing to justice, the pervasive issue of ageism has to be addressed.

'What's working' – a framework

As stated, it is important that services should be appropriate and accessible, targeted, 'joined-up', and timely.¹² Having an overarching framework rather than seeing issues in accessing justice as distinct silos is especially important. **Trust** is a significant factor in assisting to facilitate access to justice – trust in both the legal actors involved as well as trust in the legal system itself. Establishing strong relationships that foster and reinforce trust is one way to assist in accessing justice. Having appropriate, targeted and timely services will also help to develop confidence in people that they can access justice, here with a distinction being made between accessing the system and the system actually acting in a way that helps resolve the issue.

Submission: establishing and developing trust in legal actors and the legal system is imperative to increasing access to justice.

Accessibility is a significant issue. Obviously **cost** is a significant impediment to being able to access justice and also calls into question notions of the 'quality' of justice able to be accessed. There is no easy answer to the ongoing and pressing societal issue of cost. Residing in a regional, rural or remote community can significantly increase cost as access to justice is often predicated upon travel to larger centres. The issue of the quality of advice is also raised in that often people with expertise might only be accessible in metropolitan areas.

Mediation and other 'alternative' **dispute resolution methods** are preventative processes designed to be alternate to the traditional court system.¹³ 'Alternate' dispute resolution methods should be discrete processes focusing on promoting autonomy, independence and control of parties. The

¹¹ United Nations Division for Social Policy and Development of the Department of Economic and Social Affairs, *Neglect, Abuse and Violence against Older Women*, 2013, ST/ESA/351.

<http://www.un.org/esa/socdev/documents/ageing/neglect-abuse-violence-older-women.pdf> (accessed 16.01.2017).

¹² Law Council of Australia, above n 2, 11-2.

¹³ Ibid 12.

focus on self-determination may facilitate access to justice given that these ‘methods’ are designed to be less intimidating and financially more affordable. Such services can be complementary to other, more formal, forms of intervention such as advocacy and the legal system, again widening the possible avenues through which to access justice.

Submission: accessibility is a significant barrier to accessing justice fuelled by issues of cost. All dispute resolution methods, ranging in formality, should be considered as ways to increase access to justice.

Questions for consultation

What are the conditions, or enablers, which are needed to ensure that what works, can work well?

The strategies identified are all imperative to act as enablers to accessing justice.¹⁴ One additional strategy centres on **effective education** about the mechanisms and avenues through which to access justice. Many wonderful programs exist but often individuals do not know what questions to ask, or lack the confidence to seek out the information which could assist them. Knowledge is empowering and whilst educational programs exist, with respect, they do not seem to be working as successfully as they could. Therefore an innovative approach to delivering education about how to access justice is needed.

In the context of enduring powers of attorney, an empirical project was undertaken between the Queensland University of Technology and Aged and Disability Advocacy Australia (ADA), a not-for-profit advocacy organisation, this year to identify both the barriers and enablers to accessing justice where there has been an alleged breach of a valid enduring document.¹⁵ Highlighting the importance of effective education and a **transdisciplinary approach**, the key findings of the report state:

the need for an improvement in the effectiveness of the education and awareness efforts made to inform people about EPAs. It is clear that in several cases EPAs have been signed by principals who do not fully understand the implications of the EPA being put in place, as well as attorneys who do not fully understand their role and responsibilities. ... it would be worthwhile to investigate how ... a case management approach, with the involvement of all relevant multidisciplinary stakeholders, could ... improve overall situations.¹⁶

As **advocacy organisations** are often the first contact point for people seeking advice about equality before the law and access to justice, it is worthwhile working with them to promote best practice in engagement with individuals who contact them. This can also build on any targeted education campaigns.

¹⁴ Ibid 15.

¹⁵ C Cross, K Purser and T Cockburn, *Examining access to justice for those with an enduring power of attorney (EPA) who are suffering financial abuse* (2017) <https://eprints.qut.edu.au/110645/> (accessed 29 September 2017).

¹⁶ Ibid 54-5.

Submission: effective education strategies based in transdisciplinary approaches are key to ensuring the success of enablers to accessing justice.

How can the legal profession better support ‘joined-up’ and collaborative service delivery with other sectors? What can it learn from other sectors in this regard?

Promoting a multidisciplinary approach as mentioned above can also help address people becoming isolated, instead promoting a ‘joined-up’ approach. One way in which to achieve this is to better encourage transdisciplinary approaches in, for example, continuing professional education actively targeting training of the legal profession.

We submit that the development of medico-legal partnerships (MLPs) (as discussed in the consultation papers) is a good idea to improve access to justice, especially in rural areas. For example, MLPs can support mental health and access to justice by providing integrated medical and legal support to people experiencing mental illness. MLPs are already operational in many places around the world, and, provide a mechanism that has enormous potential to provide supports for legal and health professionals which, in turn, can facilitate access to justice and enable individuals to maximise their human rights. But it would be useful to extend these beyond the focus of mental health and/or youth to include projects targeted at older Australians, especially in rural and remote regions.

Having strong partnerships between health and legal professionals also provides a way in which to **improve assessments of legal capacity** through the implementation of multidisciplinary best practice. Adherence to best practice in capacity assessments helps to ensure the protection of autonomy and vulnerable individuals which, in turn, can assist with protecting legal rights and access to justice. However, significantly, the rigorous, transparent and accurate assessment of capacity is currently not occurring in Australia. Instead, capacity assessments are occurring in an ad hoc manner, subject to the knowledge and skills of individual legal and health practitioners. The lack of a satisfactory assessment process only serves to heighten the risk to already vulnerable individuals. Of fundamental importance is the determination that an individual has lost the capacity to make their own, legally recognised, decisions. Appropriate definitions, including of legal capacity, are crucial and the relevant legal standards need to be clearly established. This will not only establish the level of understanding required, but will also assist in legal and health professionals understanding what is required to satisfactorily assess legal capacity and how best to work together to achieve this. Issues of practitioner liability will only grow given the complexity of assessing legal capacity. Developing national capacity guidelines may help establish best practice which will in turn address issues of practitioner liability.

Submission: a transdisciplinary approach to professional development and the implementation of medico-legal partnerships can assist in the legal profession supporting collaborative service delivery.

What measurable indicators would signify that progress was being made for each group, having regard to the highest priorities for future action? Would a Justice Index tool be a useful addition in this regard?

We submit that a measure should be developed around the location and accessibility of services by all people, including those people in regional, rural and remote areas. That is, encouraging an increase in the number of legal services that are available either within a reasonable distance from people or via telephone or internet-based services to ensure that all communities have access to at least some form of legal support.

Further, a concrete definition of ‘justice’ would be required before any tool can be developed to effectively measure the concept. Problems exist around how this is to be quantifiably and accurately measured.

Submission: a measure should be developed which accurately determines the availability of appropriate legal services (in person or by telephone or online) to the number of people based upon location.

Would a Justice Impact Test, or alternate tools which are developed across the legal profession, help to ensure that the impacts of new policies and laws upon the justice sector are appropriately planned for and resourced during the policy process?

Theoretically, the idea of a ‘polluter pays’ principle holds some merit. However, it is important to consider that any additional layers of ‘red-tape’ will add to the barriers of delay and cost in accessing justice. It is important that if such a principle is adopted that it really is the polluter pays and that the cost is not passed onto other stakeholders – especially the individuals in question.

Submission: any test should not add to systemic delay and cost in accessing justice.

Which mechanisms would help to support the development of policies and laws in this area which are more evidence-based?

Rigorous empirical research is needed identifying both the barriers and enablers that emerge when individuals and/groups have attempted to access justice within different legal and societal contexts. The above noted project had a small sample of 121 case files from ADA were reviewed with a view to identifying barriers and enablers in the context of abuse of an EPA.¹⁷ Similar projects in different legal contexts would be beneficial. Further, conducting qualitative research would also assist to establish an evidence base from which to develop policies.

Submission: rigorous empirical research, both qualitative and quantitative in nature, is needed to identify both barriers and enablers to accessing justice within different legal and societal contexts.

¹⁷ Ibid.